

EXHIBIT 1

1 Staci Jennifer Riordan, SBN 232659
Jessica N. Walker, SBN 275398
2 **NIXON PEABODY LLP**
One California Plaza
3 300 S. Grand Avenue, Suite 4100
Los Angeles, CA 90071
4 Telephone: 213.629.6000
Facsimile: 213.629.6001
5 sriordan@nixonpeabody.com
jwalker@nixonpeabody.com

6 Attorneys for Defendant
7 **H & M HENNES & MAURITZ LP**

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10
11 UNICOLORS, INC., a California
Corporation,

12 Plaintiff,

13 vs.

14 **H & M HENNES & MAURITZ LP, a**
15 **New York Limited Partnership, and**
16 **DOES 1-20, inclusive,**

17 Defendants.

Case No.: 2:16-cv-02322

Hon. André Birotte, Jr.

**DEFENDANT H & M HENNES &
MAURITZ LP'S DISCLOSURE OF
REBUTTAL EXPERT REPORT OF
ROBIN LAKE**

Complaint Filed: April 5, 2016

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19
20 Attached hereto as Exhibit A is the Rebuttal Expert Report of Robin Lake.

21
22 Dated: April 28, 2017

NIXON PEABODY LLP

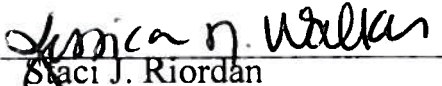
23
24 By: 
25 Staci J. Riordan
Jessica Walker
26 Attorneys for Defendant H & M
HENNES & MAURITZ LP
27
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EXHIBIT A

EXPERT REPORT OF ROBIN LAKE

QUALIFICATIONS

1. I am an associate professor at the Fashion Department of Santa Monica College, where I have been faculty since 1984. My research and teaching focuses in the areas of Fabric Science, Textile Design, Textile Dyeing, and Textile Printing. I also serve as adjunct faculty at the Beverly Hills Design Institute, where I teach classes on Textile Science, Textile Techniques, and Textile Design.

2. Since 1977, I have dedicated myself to the study and creation of textiles. In 1977, I graduated summa cum laude with a BFA in Printmaking from the Temple University Tyler School of Art. From 1983 to 2000, while pursuing my academic career, I also served as Art Director for Fashion-In-Prints, Inc., a domestic textile converter based in Los Angeles, California. During my seventeen years as Art Director, I directed a staff of artists in the practice of trend direction, design, color, and translation of fabric patterns to production. I therefore have a comprehensive understanding of the logistics, mechanisms, and output of various textile production methods from an academic, design, and practical perspective.

3. A true and correct copy of my *curriculum vitae* can be found attached to this report as **Exhibit A**.

II. ASSIGNMENT AND DOCUMENTS RELIED UPON

4. I have been retained by Defendant H&M Hennes & Mauritz LP (“H&M”) to examine the allegation of Plaintiff Unicolors, Inc. (“Unicolors”) that H&M has engaged in copyright infringement, vicarious copyright infringement, and contributory copyright infringement against Unicolors.

5. Specifically, I have been asked to perform a comparison and analysis of the Parties’ respective works in order to assess and provide my opinion on (1) the origin and construction of H&M’s Xue Xu pattern; (2) the sources of similarity

between Unicolors' EH101 pattern and public domain prints; and (3) what degree of similarity, if any, exists between Xue Xu and EH101.

6. In executing these comparisons, I have performed research and a comprehensive review of public domain artwork related to the Xue Xu and EH101 patterns, including reviewing and analyzing the source material that H&M's designer, Xiaomin Qian, identifies as her inspiration for the Xue Xu pattern.

III. SUMMARY OF FINDINGS

7. With respect to my assignment, I have concluded as follows:

- a. H&M's Xue Xu pattern appears to have been independently created through adaptation, compilation, and modification of public domain works, and primarily from a public domain pattern "idea" book, *The Album of China Textile Patterns, Vol. 18*, published by Shanghai Joint Publishing, ISBN No. 9787542640499 (printed in 2012), which is available for use by fabric designers around the world.
- b. Unicolors' EH101 pattern appears to have been adapted from public domain elements, shapes and icons which have been in use for centuries. Examples mirroring these elements' use in EH101 can be found in historical works, as well as a public domain pattern "idea" book, *Ethnic*, published by Belvedere Books, Inc. ISBN No. 88-7070-067-4 (printed in 1992), which is available for use by fabric designers around the world.
- c. It is my opinion that a low degree of similarity exists between Xue Xu and EH101, primarily created by both patterns' use of elements common to ancient and traditional works. However, significant differences exist in how these elements are portrayed

in each pattern, and several significant elements in each pattern appear to be entirely unique from each other.

III. THE XUE XU PATTERN APPEARS TO HAVE BEEN CREATED THROUGH ADAPTATION OF PUBLIC DOMAIN ART

8. H&M's Xue Xu pattern is comprised of seven distinct lines. Each line repeats a consistent motif across the width of the pattern, creating a consistent "horizontal flow" within the work. This concept of "horizontal flow" ties the pattern together – if each individual line within the pattern did not share this concept, the work would appear to be a fragmented, rather than unified expression.

9. The designer of Xue Xu, Xiaomin Qian, claims that her work was inspired by public domain art, including images from a public domain pattern "idea" book, *The Album of China Textile Patterns, Vol. 18*, published by Shanghai Joint Publishing, ISBN No. 9787542640499 ("DOMO Pattern Book").

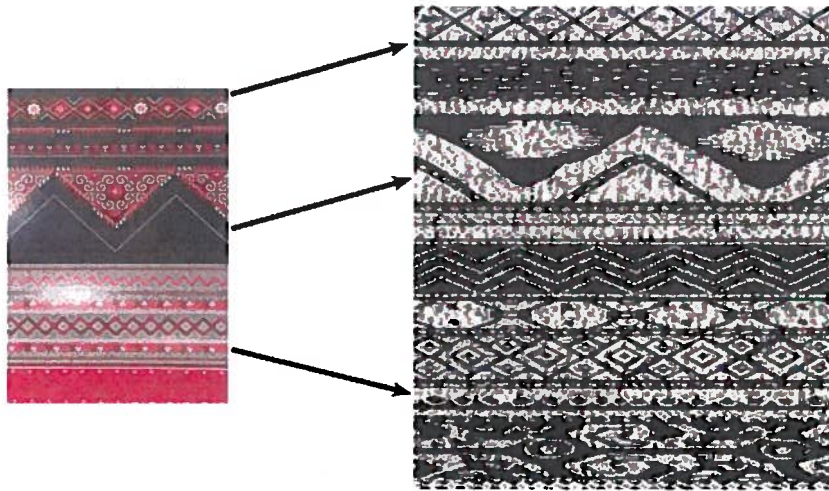
10. The use of pattern "idea" books is standard practice in the profession of fabric design. In creating a new pattern, many designers will look to prior public domain art for both inspiration and usable source material, which the designer can then adapt and modify to create a new work. In doing so, designers will often select a previously existing pattern as the primary "source" pattern for their new work. Utilizing large swaths of this primary pattern, a designer will then select excerpts from other public domain patterns and draft new, original design elements which are then incorporated into or superimposed over the primary work.

11. Based on my review of Xue Xu and the identified source material, it appears that Xiaomin Qian followed this process in creating her design. A public domain pattern with similar elements to Xue Xu appears in the DOMO Pattern Book at page 379 (the "Primary Pattern"). Like Xue Xu, the Primary Pattern contains a top line of horizontal diamonds, followed by a narrow, largely unfilled line, followed by a prominent line featuring mountain-like shapes and a circular

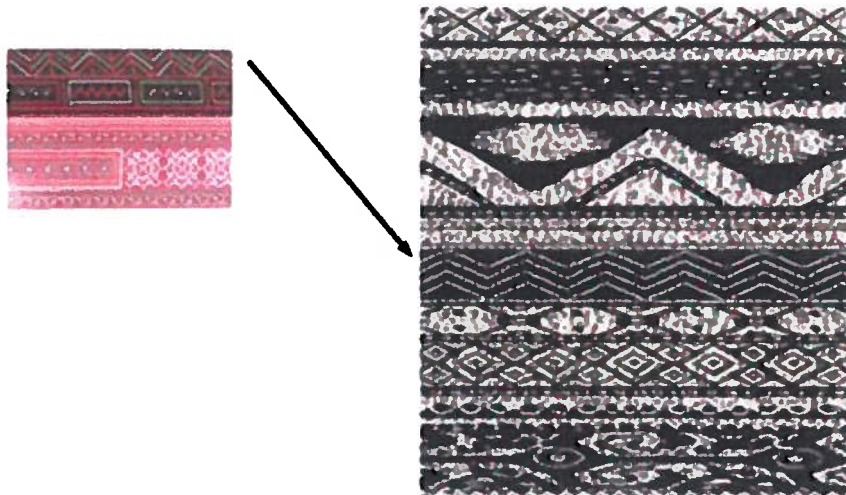
sun-like image repeated between the mountains' peaks. Underneath the "mountain" line, four more lines appear, featuring a "zig-zag," cross-hatched and squared diamonds, circular bumps, and finally, a broad, plain stripe. A true and correct copy of the Primary Pattern is attached to this report as **Exhibit B**, and a comparison of the Primary Pattern with Xue Xu is presented below:



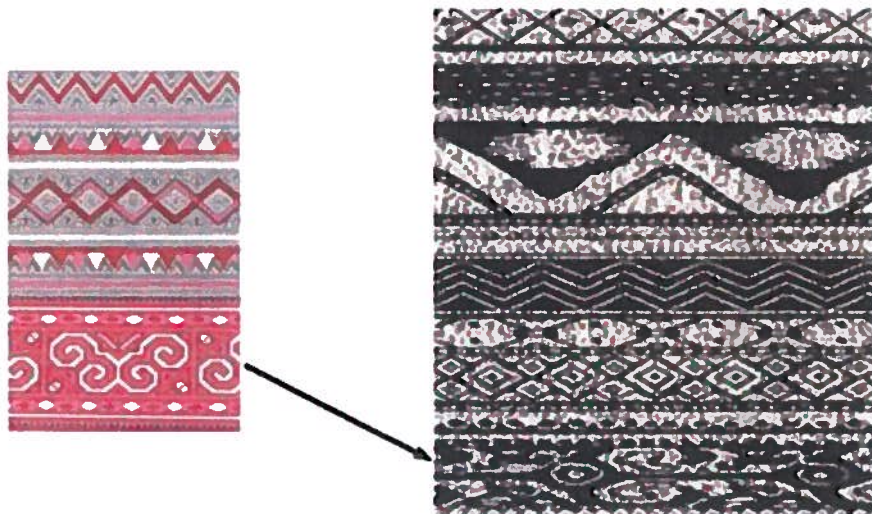
12. Once the Primary Pattern was selected, I believe that Xiaomin Qian set upon modifying it in order to create a "new" work. The central element in the Primary Pattern is the "mountain" shape – a very simple, bold pattern that stands out from the other, more frenetic lines. The "mountain" shape itself appears to have been stretched out and filled into a softer, more graceful shape, while the sun above it was simplified and emphasized into a single, circular shape, rather than a repeating background image. Another significant change was the elimination of floral elements from the top line's horizontal diamonds; the flowers were replaced with simple, round "studs," making the pattern more flowing and less rigid. A true and correct copy of a high-resolution comparison image for the mountain shape and Xue Xu can be found attached to this report as **Exhibit C**, with a reproduction shown below:



13. Other elements found in Xue Xu have plainly been modified from the DOMO Pattern Book, and, in fact, from the same page in the book as the Primary Pattern. For example, a zig-zag pattern appears in a related image on page 379 of the DOMO Pattern Book, which, with minor modification, has been recreated as a line element in Xue Xu. The zig-zag pattern in this supplemental design, recreated in Xue Xu, is a very common design element. In the original supplemental design, the zigzag contained a thin, red, vertical stripe at the peak and valley of each line. It is evident that Xiaomin Qian eliminated this stripe in order to emphasize the “horizontal flow” of the zig zag, and to minimize the rigidity of the original form. By removing the interruption of the original supplemental design’s vertical lines, the diagonal form of the zig-zag design is emphasized, mirroring and reinforcing the slanted, proportional form of Xue Xu’s mountain and various diamond shapes. A true and correct copy of a high-resolution comparison image for the zig-zag element and Xue Xu can be found attached to this report as **Exhibit D**, with a reproduction shown below:

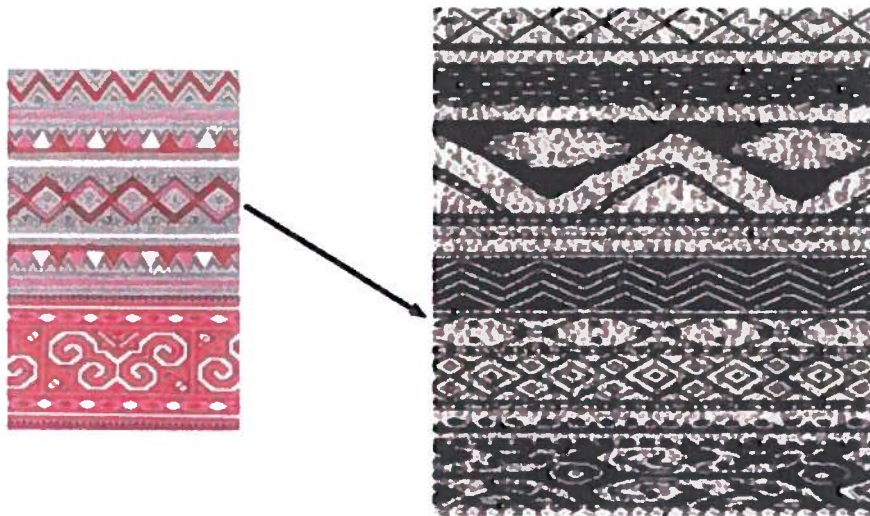


14. Another supplemental pattern – again from page 379 of the DOMO Pattern Book – provides the source for Xue Xu’s rounded coil shapes. These represent a major change from the Primary Pattern, which contained only a bland, red block where the coil shapes appear in Xue Xu. Xiaomin Qian appears to have modified these shapes from their original form in creating Xue Xu, but the source material is plainly evident in the final product. In particular, the creation of Xue Xu’s bottom element reveals a process of “twisting and stacking” the original image to create Xue Xu’s rounded “butterfly” shape. Much like the removal of the vertical lines from the “zig zag,” this “twisting and stacking” of the original image, as well as the elimination of the vertical line running down the center of it, eliminates the rigidity of the original image. The resulting rounder, softer, look in Xue Xu once again creates and emphasizes a concept of “horizontal flow,” both within the line within the pattern, and across the unified pattern, as a whole. A true and correct copy of a high-resolution comparison image for the butterfly element and Xue Xu can be found attached to this report as **Exhibit E**, with a reproduction shown below:



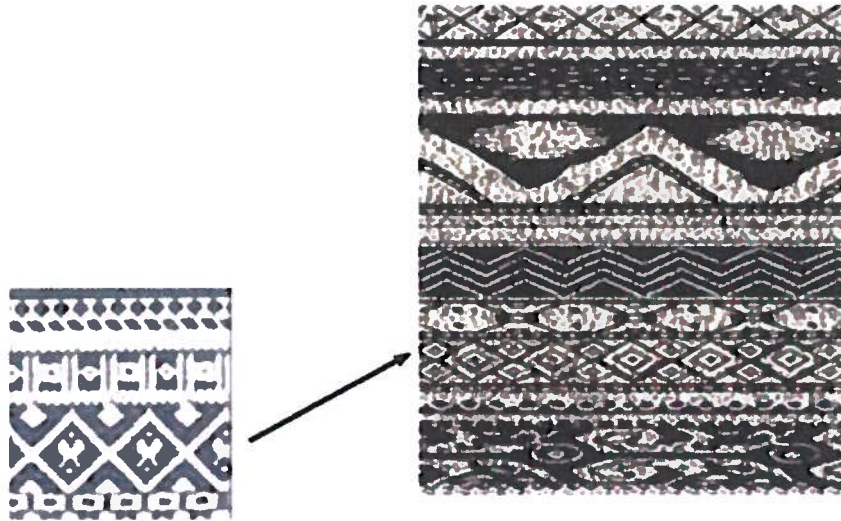
15. The Xue Xu pattern is also marked by two different sets of large diamonds. The first of these, which appear just below the “zig-zag” in the Xue Xu

pattern, is taken from the same source pattern as Xue Xu's rounded coil shapes. Xiaomin Qian appears to have maintained the integrity of the original diamond pattern, but has stretched the aspect ratio of the diamond to widen and soften the diamond's angles so that they match the slope and slant of the mountain and other diamond shapes in Xue Xu. Establishing consistent angles across a work, as done here, is yet another way to create coherence and uniformity in the final work. A true and correct copy of a high-resolution comparison image for the stretched diamond element and Xue Xu can be found attached to this report as **Exhibit F**, with a reproduction shown below:

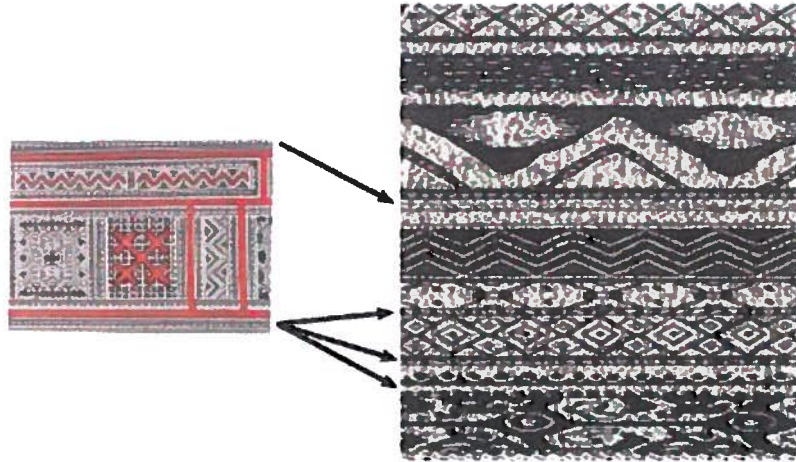


16. The second diamond shape, which appears below the “widened” diamond shape in Xue Xu, appears to be taken from Xiaomin Quan’s inspiration board, and seems to be the only source material for Xue Xu that did not originate from page 379 of the DOMO Pattern Book. Once again, the slope and slant of these diamonds is consistent with the other lines in the work, ensuring uniformity. Moreover, the use of more than one variation on a common shape – here, a diamond – is a very common trope in textile design. This second diamond shape is more complex, detailed, and bold, creating an interlocking look that adds strength and structure to Xue Xu’s free-flowing form while maintaining the rhythm of the

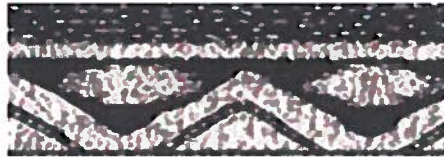
work's horizontal flow. Once again, Xiaomin Quan appears to have made modifications to reduce the pattern's ornamentation, removing the "cross" at the diamond's center with a simple, round "stud." A true and correct copy of a high-resolution comparison image for the complex diamond element and Xue Xu can be found attached to this report as **Exhibit G**, with a reproduction shown below:



17. Small white triangles – once again from page 379 of the DOMO Pattern Book – are also recreated between major line elements in Xue Xu. These elements, while small and subtle, add needed texture, and reinforce the rhythm and uniformity of the work by tying the pattern's central mountain together with the diamond, zig-zag, and other related shapes that appear across the work. The small white triangles also create negative space in the form of small black triangles, once again mimicking the negative space of the black triangles created in the mountain line through the isolation of Xue Xu's mountain and sun pattern. This positive/negative interplay, known within the textile industry as counterchange, is among the most common tropes in black and white textile design. A true and correct copy of a high-resolution comparison image for the small triangle element and Xue Xu can be found attached to this report as **Exhibit H**, with a reproduction shown below:



18. Finally, Xue Xu also contains a fully original element in the form of the speckled and dotted line located near the top of the pattern. This interesting visual choice, strongly emphasized by the medium of yarn used by H&M in the final Garments it sold to the public, results in a deeply textured, snow against the sky--like image (in fact, Xue Xu translates as falling snow); a representation of the sky above Xue Xu's mountain and sun. While not a complex element, this speckled and dotted line adds thematic coherence to the work. Here is a detail of Xue Xu, showing the interplay between the "snow" and "mountain" elements:



19. Overall, the effect of these modifications to and supplementation of the original Primary Pattern is the creation of a more bold, simplified, and geometric image. Xue Xu's pared down lines and texture, in contrast to the detailed, colorful, and floral Primary Pattern, create a related, yet distinct new work. Moreover, by sewing Xue Xu with black and cream yarn on a jacquard loom in creating the final Garments that were sold to the public, the natural and geometric textures of the original Xue Xu image were further enhanced and emphasized. In my opinion, Xue Xu was created based upon and adapted from the Primary Pattern and other public domain works, as described above.

IV. UNICOLORS' PATTERN SHARES COMMON ELEMENTS WITH STANDARD, PUBLIC DOMAIN ART

20. Much like the process that resulted in Xue Xu, Unicolors' designer, Hannah Lim, like all experienced designers, has a designer's vocabulary which is based on images and designs she has seen before. As discussed in her declaration, in creating EH101, Ms. Lim observed public domain works at the Museum of Natural History, and, almost certainly, works from public domain pattern "idea" books and other sources of public domain art. However, EH101 is far more similar to public domain works than Xue Xu; Ms. Lim appears to have implemented very little modification from the public domain shapes, images, and patterns that pre-exist her work.

21. In her declaration, Ms. Lim has identified six distinct elements, or lines, repeated across the EH101 pattern: (1) a man next to a tiki house; (2) waves; (3) pebbles; (4) fish; (5) a "simple geometric design" similar a vertical diamond; and (6) an unnamed "geometric design" in the shape of an octagon. While Ms. Lim's names for these items may be unique, their appearance and use in fabric patterns is quite common.

22. In analyzing EH101, I consulted several public domain works, including a public domain pattern "idea" book, *Ethnic*, published by Belvedere Books, Inc. ISBN No. 88-7070-067-4 ("Unicolors Pattern Book"), as well as works from the anthropological collection of the Natural History Museum of Los Angeles County (the "Museum Collection"). Upon review of works from these sources, it is evident to me that EH101 is strongly inspired by, if not directly taken from, this public domain art.

23. Ms. Lim's "man next to tiki house" element can be found in patterns within the Unicolors Pattern Book, as well as in multiple images from the Museum

Collection. A comparison of EH101 and these public domain patterns is attached as **Exhibit I**.

24. Ms. Lim's "waves" element can be found in patterns within the Unicolors Pattern Book, as well as in multiple images from the Museum Collection. A comparison of EH101 and these public domain patterns is attached as **Exhibit J**.

25. Ms. Lim's "pebbles" element can be found in patterns within the Unicolors Pattern Book, as well as in multiple images from the Museum Collection. A comparison of EH101 and these public domain patterns is attached as **Exhibit K**.

26. Ms. Lim's "fish" element can be found in an image from the Museum Collection. A comparison of EH101 and this public domain pattern is attached as **Exhibit L**.

27. Ms. Lim's "diamond" element can be found in patterns within the Unicolors Pattern Book, as well as in multiple images from the Museum Collection. A comparison of EH101 and these patterns is attached as **Exhibit M**.

28. Ms. Lim's "octagon" element can be found in a pattern within the Unicolors Pattern Book. A comparison of EH101 and this public domain pattern is attached as **Exhibit N**.

29. Finally, Ms. Lim's EH101 pattern contains an additional "cross-hatched" or ribbon-like element which she does not address in her declaration. However, through my research, I have found that this element, like the others, originates from public domain sources, including the Unicolors Pattern Book, as well as in at least one image from the Museum Collection. A comparison of EH101 and these public domain patterns is attached as **Exhibit O**.

30. In sum, in my opinion, EH101 was constructed through the selection and arrangement of public domain works.

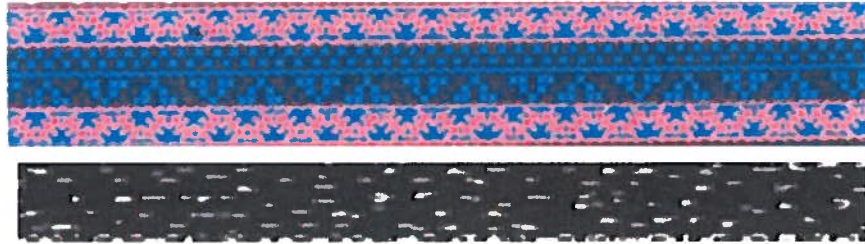
III. WHILE A LOW DEGREE OF SIMILARITY EXISTS BETWEEN THEM, DISTINCT, SIGNIFICANT, AND MATERIAL DIFFERENCES EXIST BETWEEN THE XUE XU AND EH101 PATTERNS

31. I see several distinct differences between Xue Xu and EH101 when performing a side-by-side comparison. For example, EH101 has a vertical, hand-drawn diamond shape containing four layers. Xue Xu also has a diamond pattern – as such basic shapes are very common in ethnic, native, or archeological patterns – but Xue Xu’s diamond is horizontal, contains only two layers, and also contains equally proportional triangle shapes above and below it:



32. Next, where EH101 has an intricate, multi-lined “cross-hatched,” ribbon-like element, Xue Xu has a randomized, speckled band. In her declaration, Ms. Lim provides her opinion that “[t]he technique of using the knit of a knit fabric to create a pattern cannot achieve the same level of detail that printing can,” and that if DOMO had utilized the EH101 pattern to create H&M’s garments, that effort would “result[] in sections of the Garment which appear to be blank space or random patterns of dots.” I must strenuously disagree with Ms. Lim’s opinion. H&M’s garments are woven from yarn, on a jacquard loom, a process which is capable of producing textiles with exceptional levels of detail. Had DOMO utilized EH101 in weaving and producing H&M’s Garments, such details would be evident in the final product. Based on my experience with both textile design and the capabilities of jacquard loom weaving, Xue Xu’s randomized, speckled band

was a conscious and deliberate design choice, and was created through use of a pattern other than EH101:



33. With respect to EH101's "man next to tiki house" and Xue Xu's "mountain and sun" elements, some minor similarity does exist, largely created by the similar use of broad, basic triangle shapes. However, where EH101's pattern contains six separate layers of texture and a narrow, sharp angle to its triangles, Xue Xu instead portrays broad, flowing mountain shapes. Additional differences exist between EH101's man and Xue Xu's sun – where EH101 portrays an element with rigid, squared off, ear-like edges, Xue Xu portrays a consistently striated sphere, mimicking the rays of the sun:

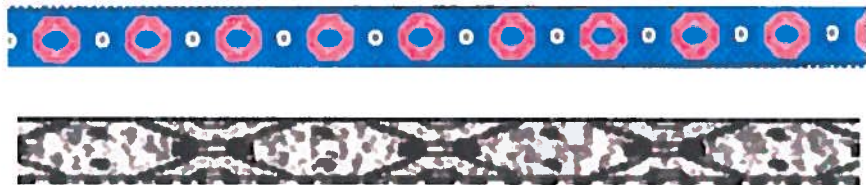


34. The next major point of comparison between the works is EH 101's waves, in contrast to Xue Xu's zig-zags. EH101's waves are narrow, choppy, and tightly packed against each other, whereas Xue Xu's zig-zags are loose, wide, and emphasize the work's overall horizontal flow. Much like EH101's "man next to tiki house" and Xue Xu's "mountain and sun" elements, some minor similarity

does exist here; however, that similarity can be attributed to the very basic and public-domain nature of such simple elements:



35. Moving down the pattern, an octagon element appears next in EH101. This is significantly different from Xue Xu's "widened" diamond shape; the patterns do not even share the same number of sides of the presented element, and the details within each work (an oval within EH101's hexagon, and two parallel dots in Xue Xu's widened diamond), are entirely distinct from each other:



36. EH101's next element is a series of hand-drawn, irregular "pebbles," which, to the trained eye, share little similarity with Xue Xu's crisp, uniform, and detailed "second diamonds." Xue Xu contains a repeating pattern of small diamonds that share crisp edges with larger diamonds, reinforcing a clean, bold look; a strong difference from EH101's purposefully cruder, irregular, hand-drawn look. EH101's "pebbles," in turn, each contain an open center and a textured ridge on each sub-element, complete with a naturalistic, unevenly-spaced finish. Xue Xu's crisp diamonds, including a single-dotted center and thin, unadorned lines, provide an additional point of difference between the elements.



37. Finally, while both EH101 and Xue Xu contain a second prominent element in addition to their broad, basic triangle shapes, several substantial and distinct differences exist with these features. In EH101, a diamond shaped center with a cross branches out into two thin, mirrored “arms” which curl back into the element’s center. In Xue Xu, however, the pattern’s chunky “butterfly” form leads out into four arms, each different from the other. The most prominent of these terminates in a thin, leafy protuberance with three leaves and a perfectly round ball with a dot in its center. These elements, while both involving curved elements, are considerably different from each other:



38. Overall, very little true similarity exists between EH101 and Xue Xu. What similarity does exist appears to be attributable to both patterns’ reliance on public domain artwork consisting of basic geometric shapes and common tropes in the field of “ethnic” textile design. Moreover, as discussed above, Unicolors’ allegation of infringement by H&M is not supported by the medium used to create each pattern. Because works constructed from yarn and jacquard looms are capable of creating exceptional detail (consider, for example, an intricate tapestry), neither the use of yarn nor a jacquard loom explains the significant and evident design differences between the works. Rather than supporting similarity, as Ms. Lim contends in her declaration, the absence of similar details between Xue Xu

and EH101 strongly reinforces the differences between Unicolors and DOMO's patterns and expression of their source material. It is my opinion that the Xue Xu and EH101 patterns are unique and not substantially similar to each other.

ROBIN LAKE

and FFF01 strongly reinforces the differences between Unicolors and DOMCO's patterns and expression of their source material. It is my opinion that the Xue Xu and FFF01 patterns are unique and not substantially similar to each other.


ROBIN LAKE

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 300 S. Grand Avenue, Suite 4100, Los Angeles, CA 90071-3151. On April 28, 2017, I served a copy of the within document(s):

DEFENDANT H & M HENNES & MAURITZ LP'S DISCLOSURE OF REBUTTAL EXPERT REPORT OF ROBIN LAKE

- ☐ (BY FACSIMILE) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ (BY MAIL) by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- ☐ (BY OVERNIGHT COURIER) by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an agent for FedEx for overnight delivery.
- ☐ (PERSONAL DELIVERY) by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ (BY E-MAIL) by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

C. Yong Jeong, Esq.
Amy Choe, Esq.
Jeong & Likens, L.C.
1055 West 7th Street, Suite 2280
Los Angeles, CA 90017

Tel: 213-688-2001
Fax: 213-688-2002
jeong@jeonglikens.com
amy.choe@jeonglikens.com

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 28, 2017, at Los Angeles, California.


Heidi Ornelas

EXHIBIT A

Robin Lake

2328 26th Street • Santa Monica, CA 90405

Phone: (310) 424-0350 • E-Mail: raglake@gmail.com

Teaching Experience

1984 to present

Santa Monica College, Associate Faculty, Fashion Department

Fabrics for Fashion Design and Merchandising: Fabric science, textile design, dyeing, and printing

Color Analysis: Color theory and merchandising

2016 to present

Beverly Hills Design Institute, Adjunct Faculty

Textile Science, Textile Techniques, Textile Design

2011 - 2014

Sewing Arts Center, Textile Instructor

Shibori Discharge on Fabric, Blueprinting on Fabric, Screenprinting on Fabric, Relief Printing on Fabric

1980-1987

Woodbury University, Adjunct Faculty

Textile Design and Printing

Education

BFA summa cum laude Temple University, Tyler School of Art 1977

Major: Printmaking

Temple Abroad in Rome, Italy 1975-1976

Undergraduate study at Brown University and Rhode Island School of Design 1973-1975

Postgraduate studies in Ethnic Costume at Woodbury University

Postgraduate studies in Printmaking, Photography, Metalsmithing, Watercolor, Digital Design at Santa Monica College

Professional Experience

Ongoing Personal and Freelance projects

1983-2000

Fashion in Prints, Art Director

Directed staff of artists for domestic fashion textile converter. Oversaw trend direction, design, color, and translation to production. Worked with management, sales, vendors, and printing factories.

1978-1981



Sheri Roese, Inc., Head of Design Department, Coordination Manager, Production Manager

The fabric produced on site was hand-painted tussah silk for the luxury home furnishings trade.

1977-1978

Roese Studios, Production Handpainter, Dye Colorist

EXHIBIT B



EXHIBIT C

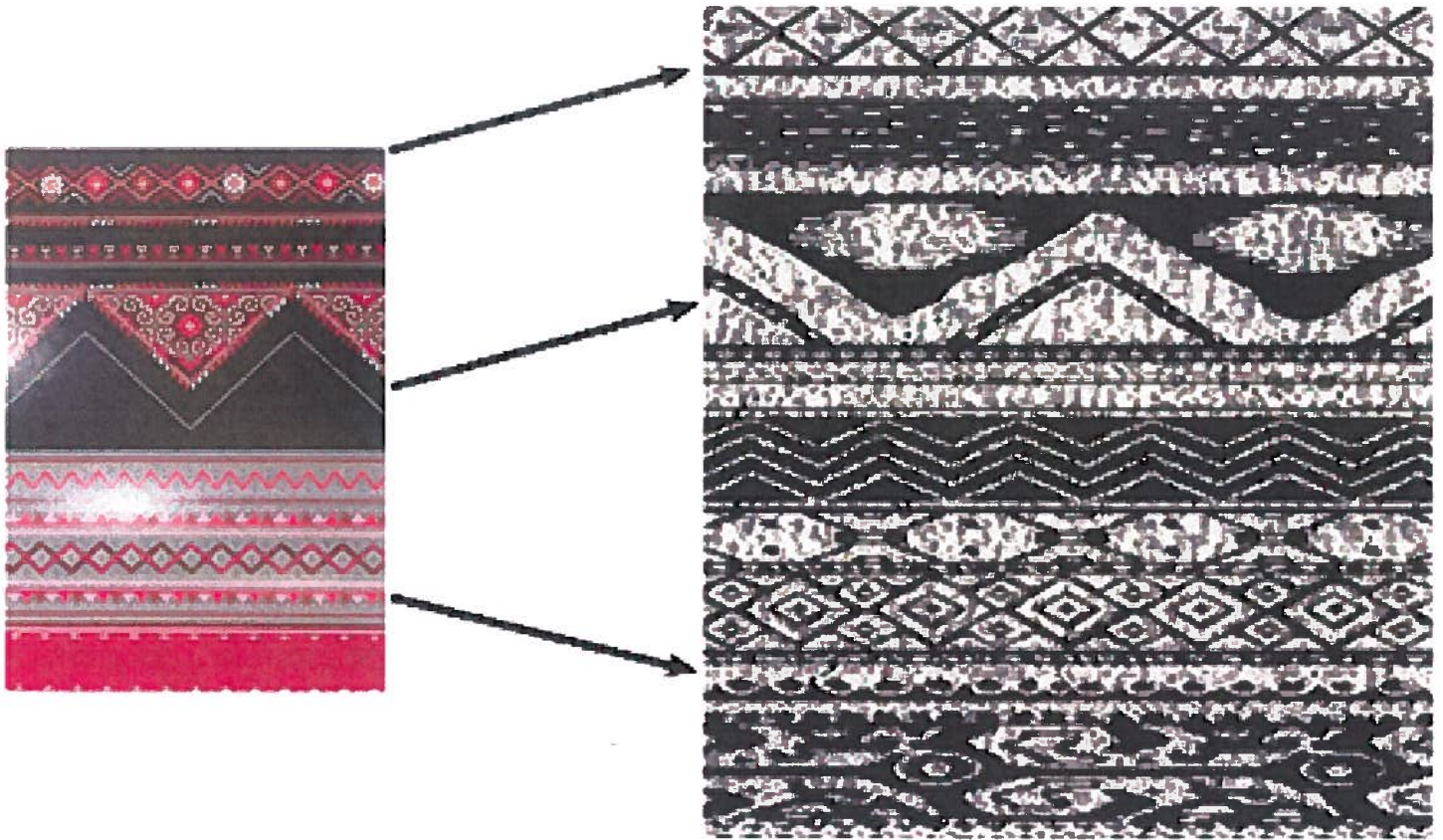


EXHIBIT D



EXHIBIT E



EXHIBIT F



EXHIBIT G



EXHIBIT H

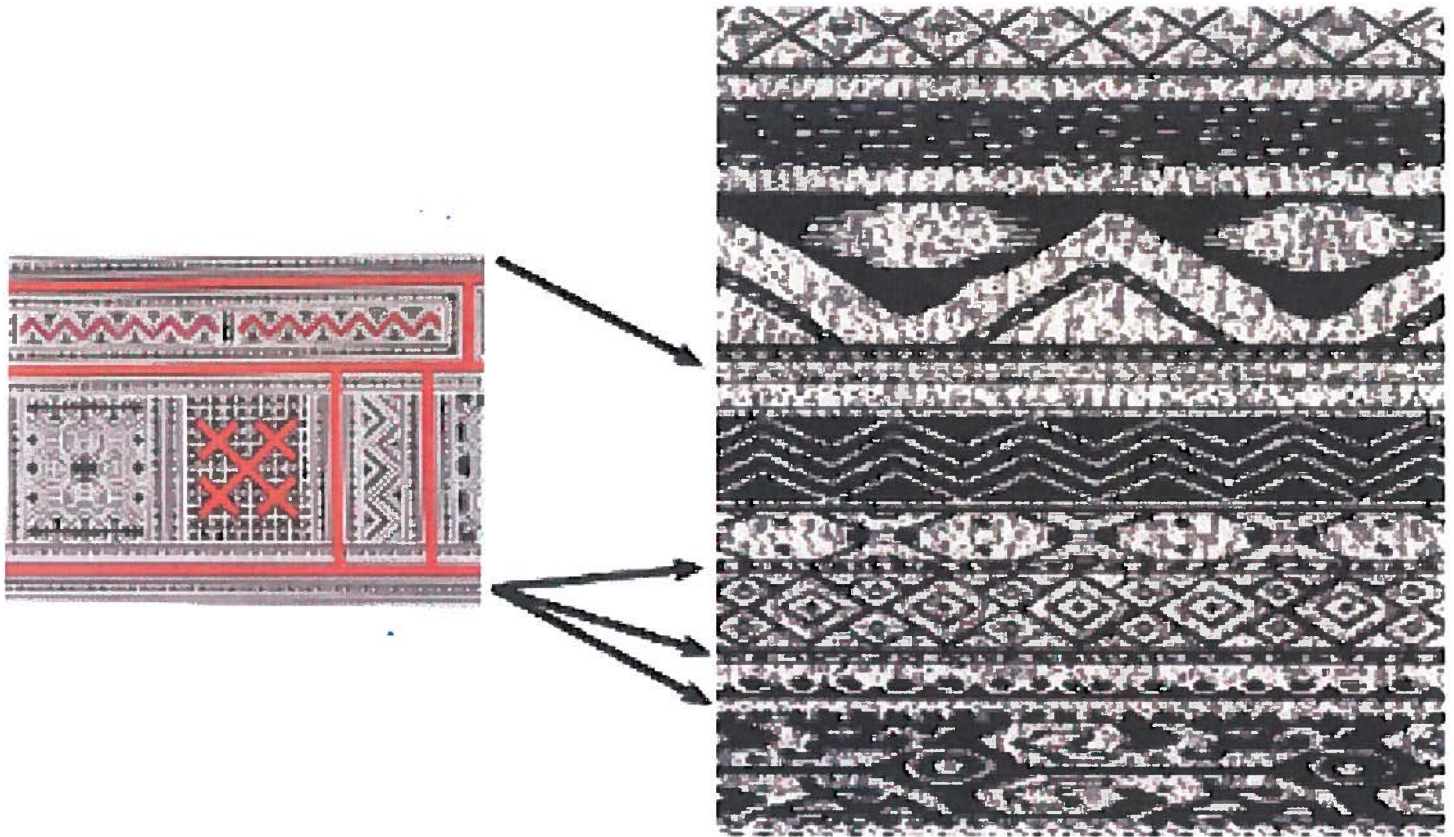
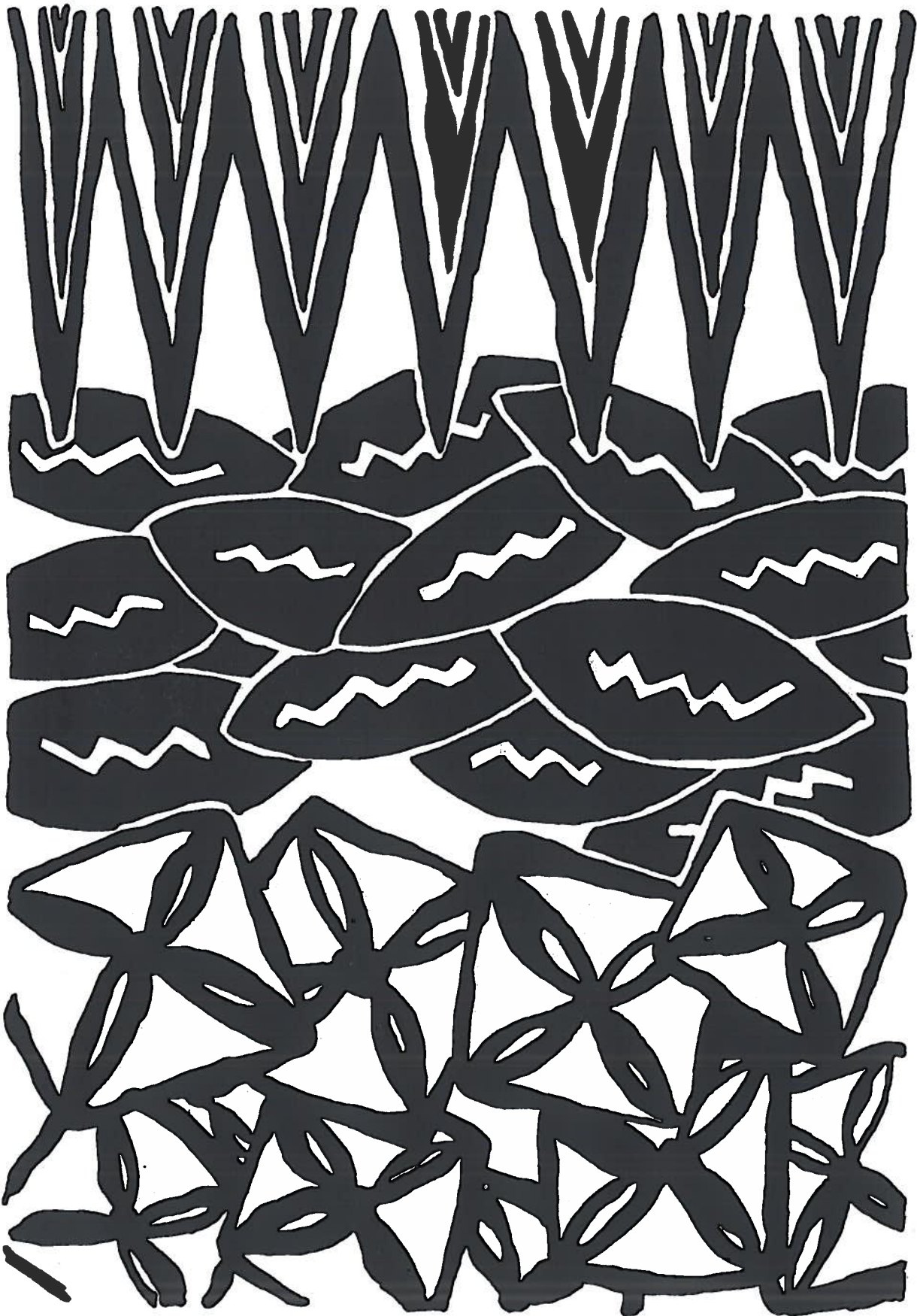


EXHIBIT I



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4/25/2017

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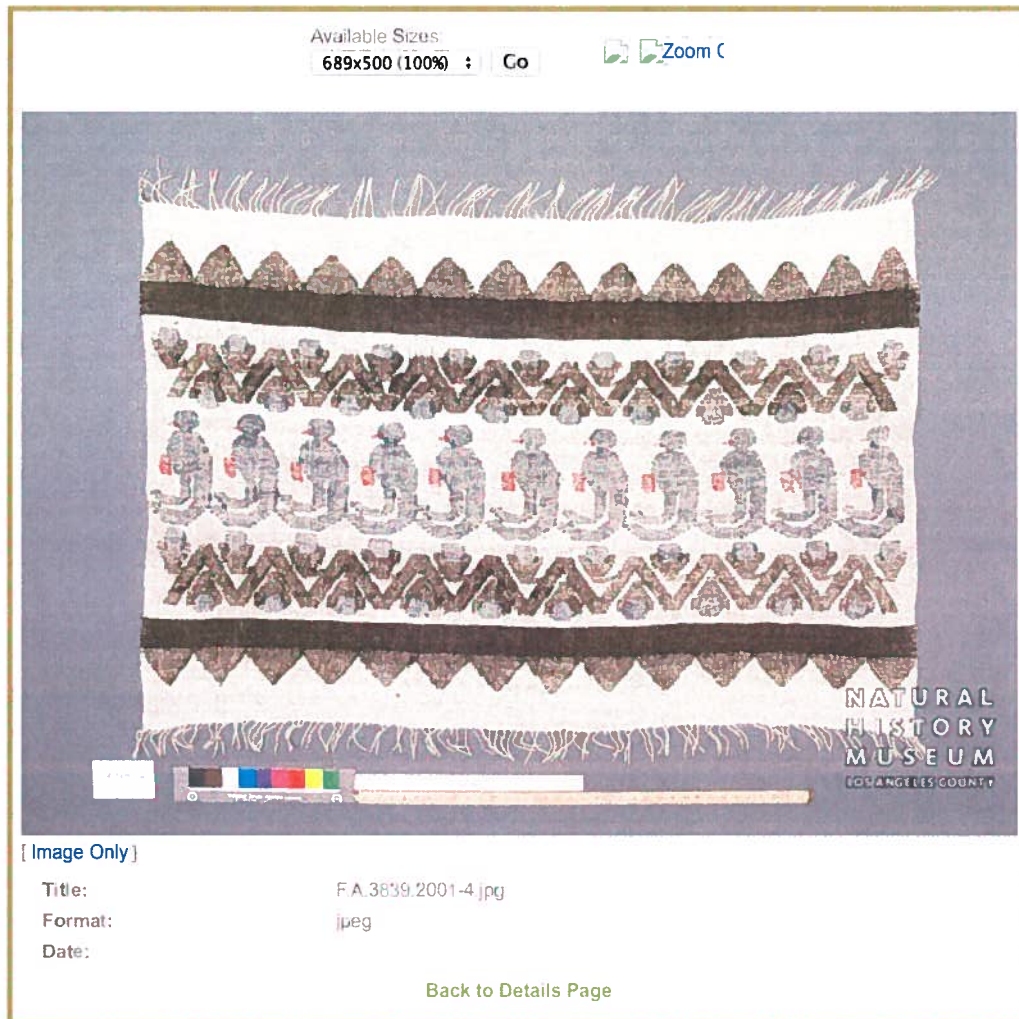
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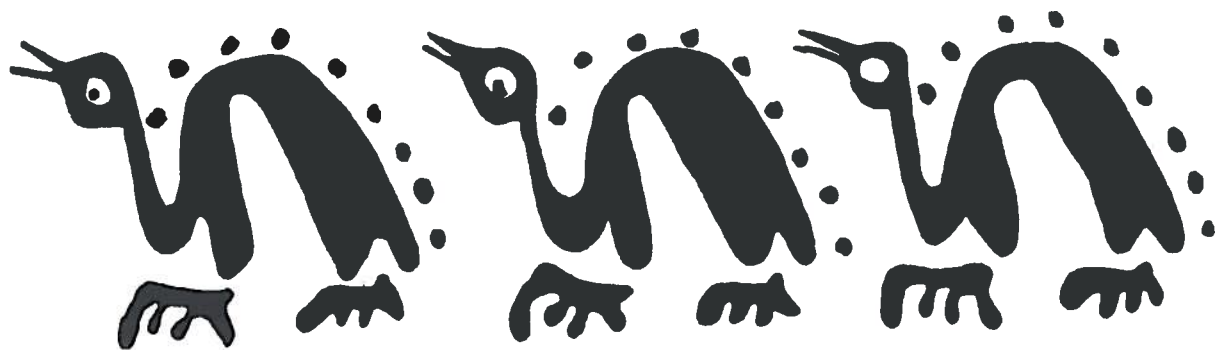
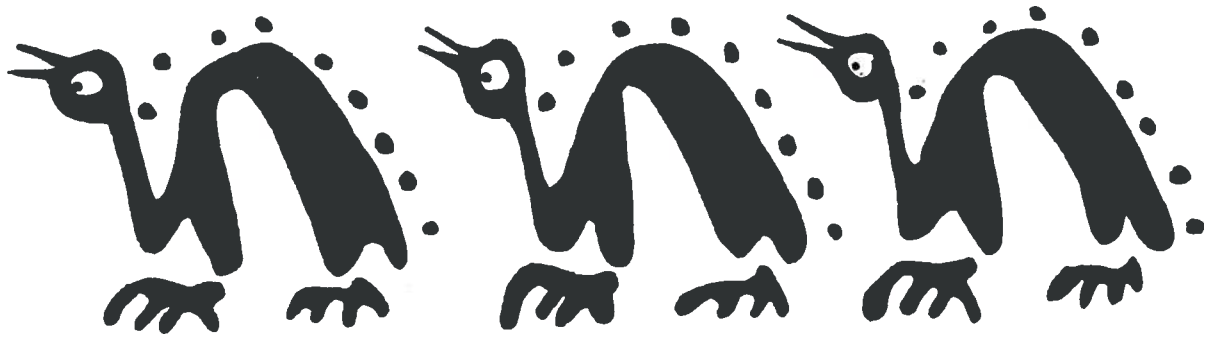
Anthropology Collection Image Display

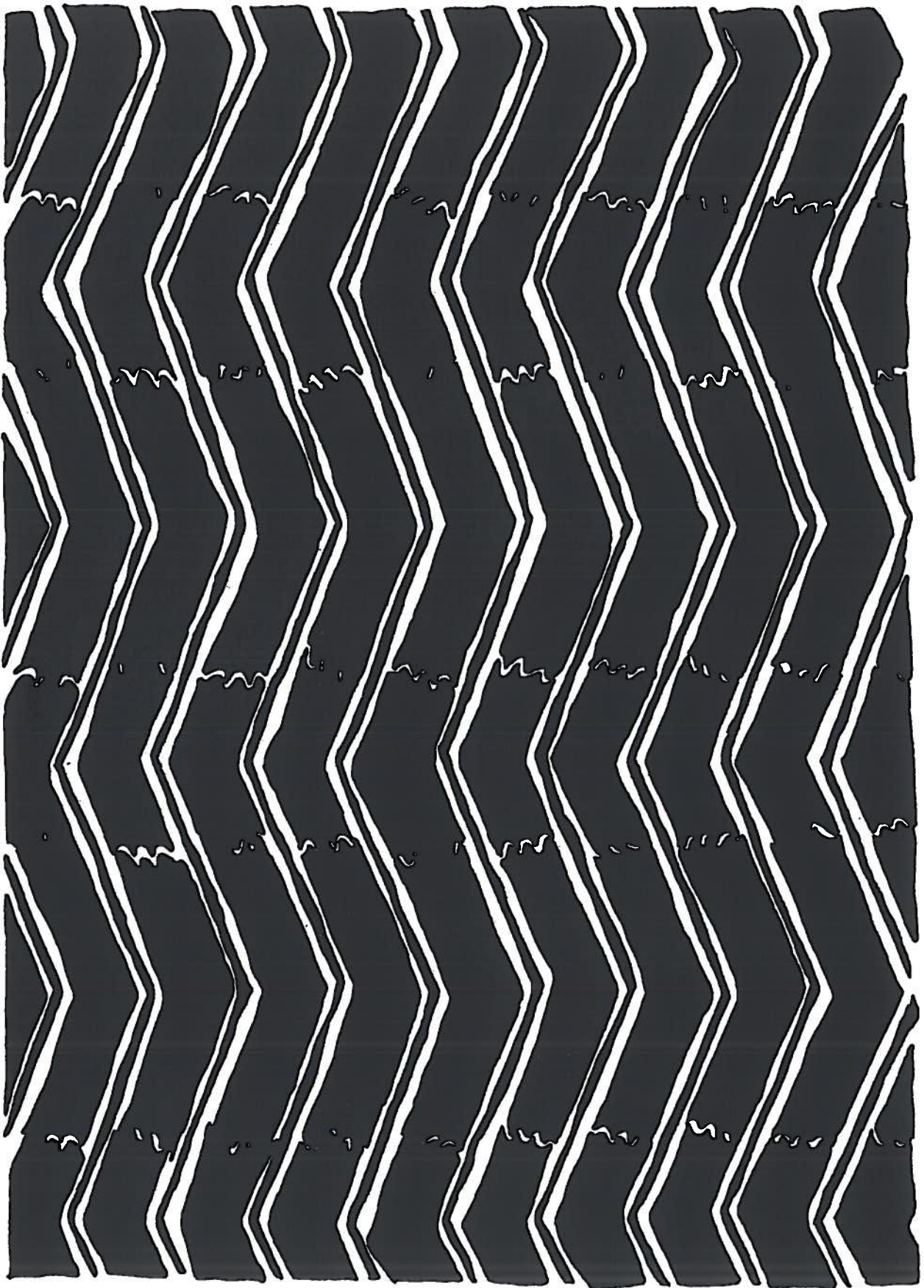
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EXHIBIT J





HMU0000189



HMU0000200



HMU0000201



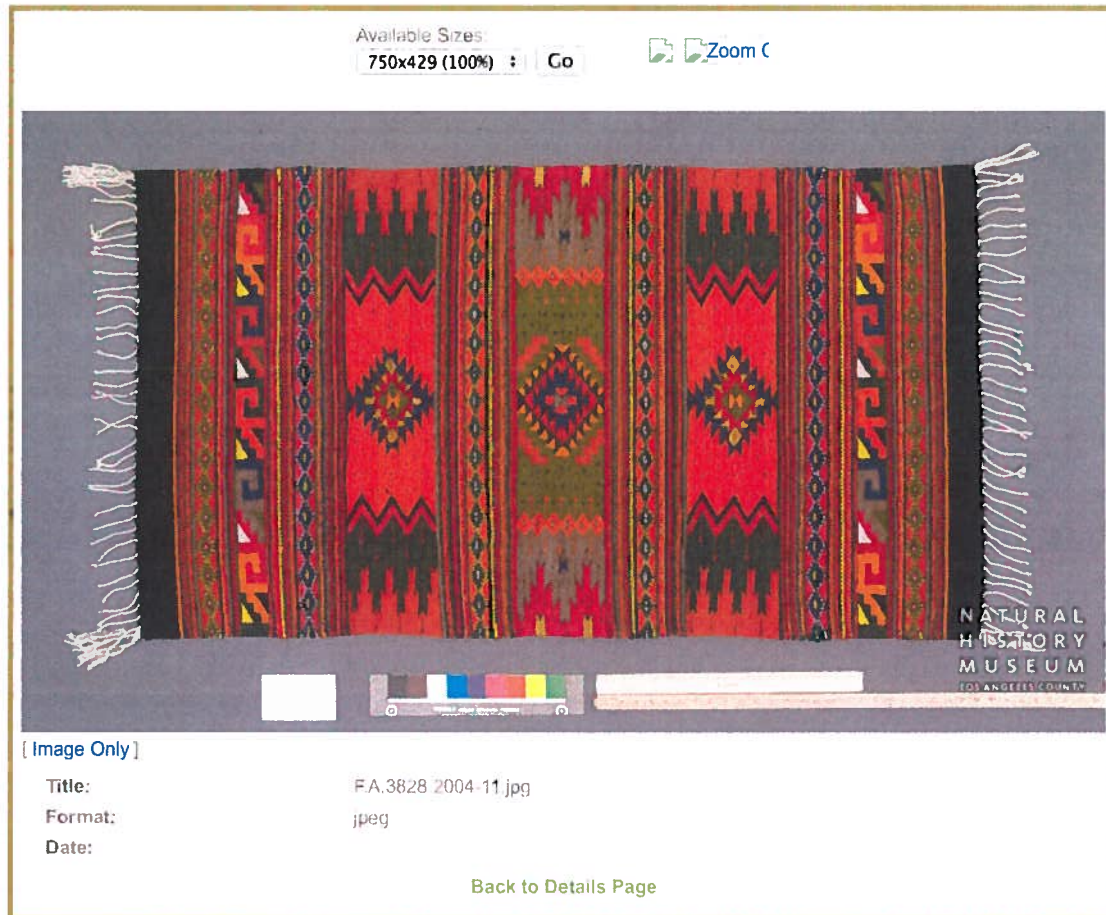
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EXHIBIT K



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EXHIBIT L

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EXHIBIT M



HMU0000176



HMU0000198



HMU0000204

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Available Sizes:
750x499 (100%) : Co  Zoom C



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[Image Only]

Title:	P438 61-2.jpg
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Description:	High quality image

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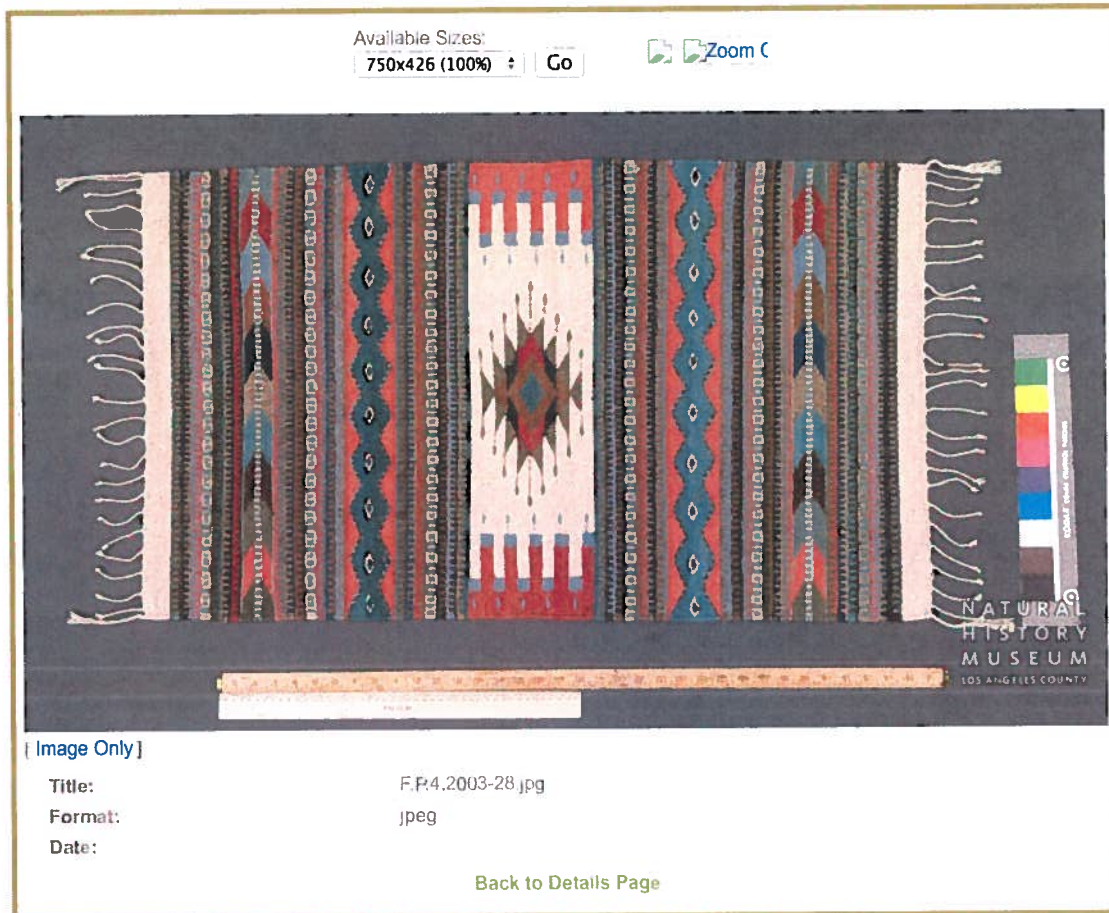
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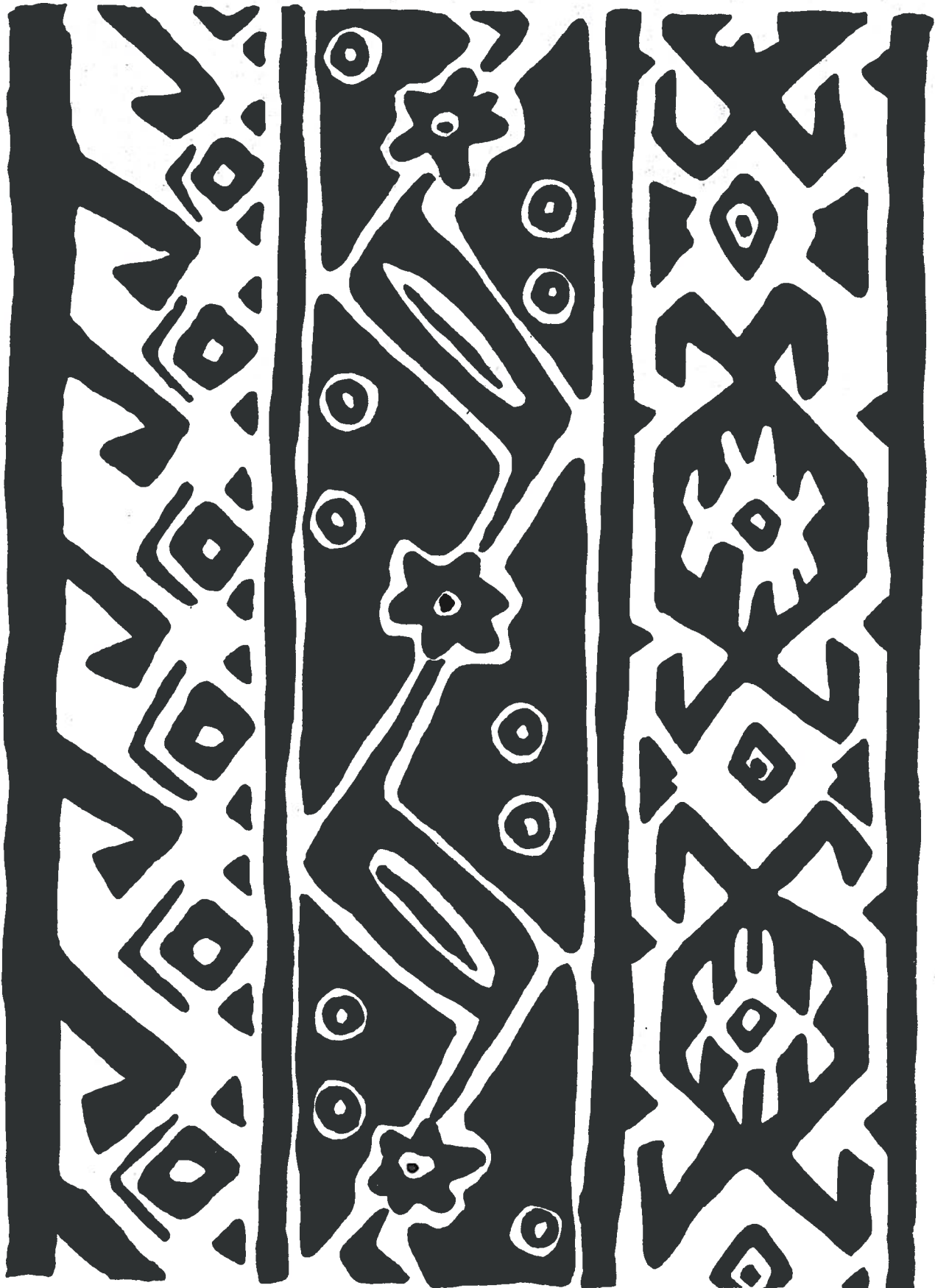
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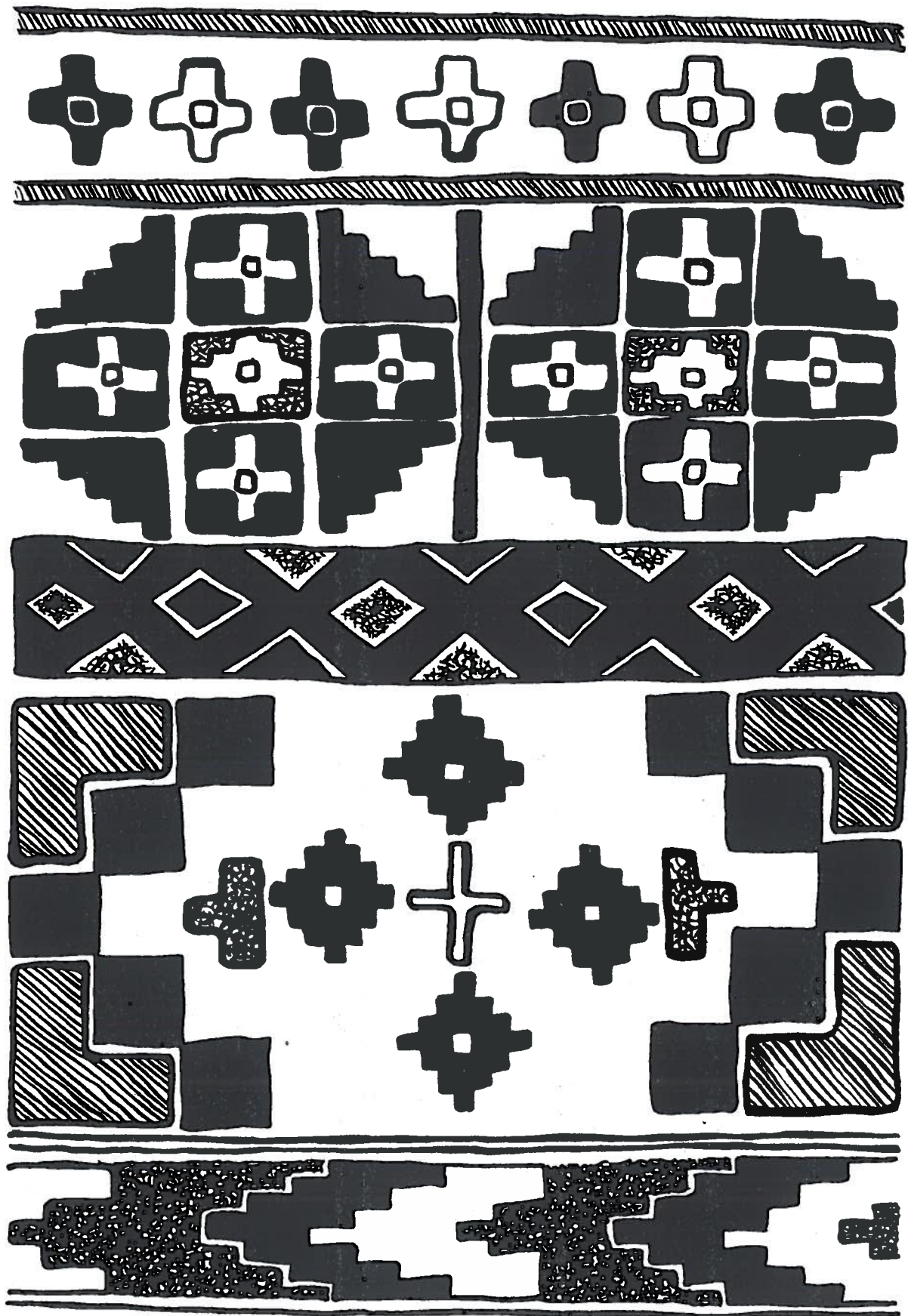
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EXHIBIT N



HMU0000178

EXHIBIT O



HMU0000195

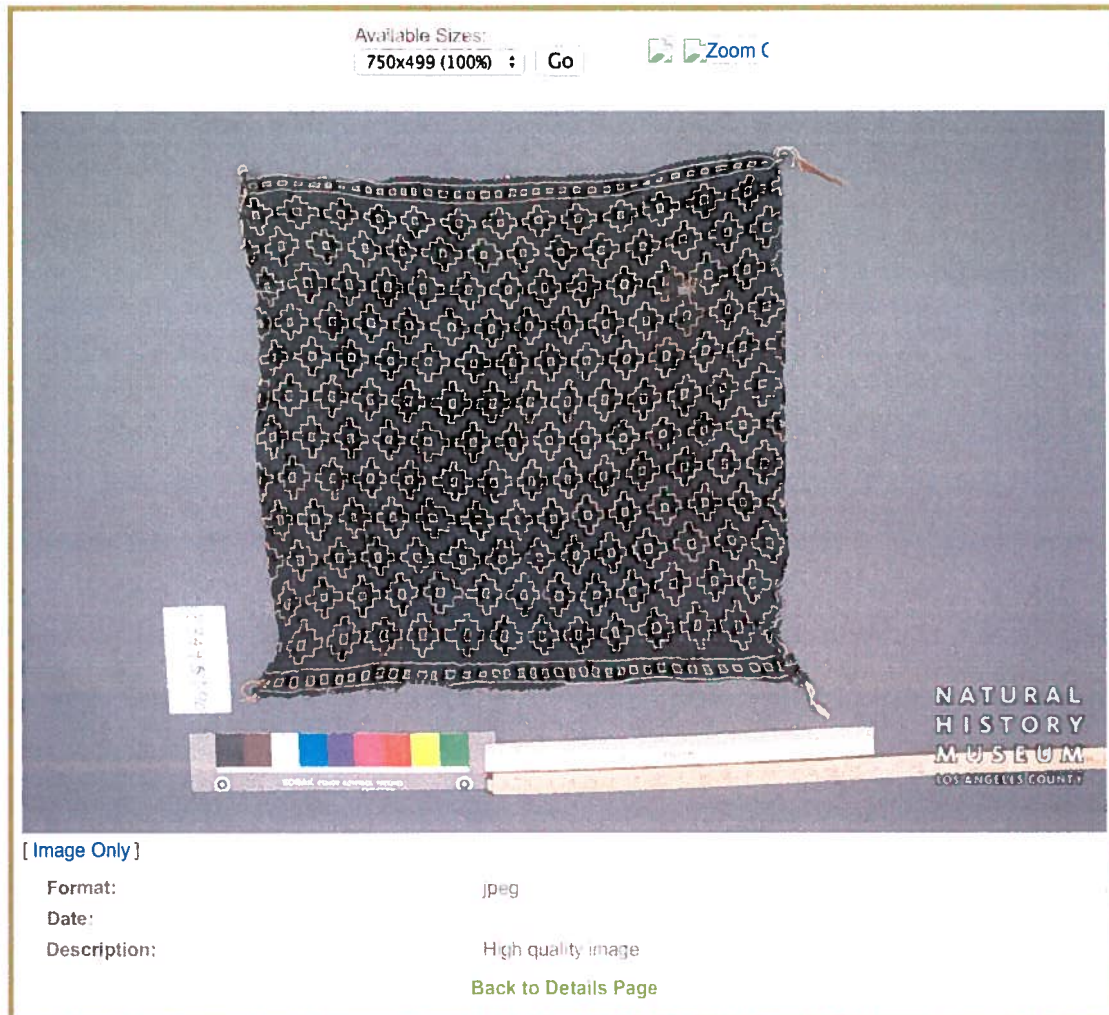
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